

No authority has been cited nor have I been able to find any which says that the learned judge was wrong in doing what he did. He had considered the issues raised by the debtors on the various actions, and was no doubt satisfied that once the act of bankruptcy had been committed on his dismissing the application to set aside the Notice, any further delay to provide the respondents with relief would, in the peculiar circumstances surrounding this case and the connected suits, defeat the ends of justice.

I would therefore dismiss this appeal with costs. Since the grounds of appeal in Civil Appeals No. 81/76 and 82/76 are identical, and are according to learned counsel for the appellant in all these three appeals to be decided on the result of this appeal, appeals Nos. 81/76 and 82/76 are also dismissed with costs. Deposit in respect of each appeal to respondents to account of taxed costs.

Ali Ag. C.J. (Malaya) and Raja Azlan Shah F.J. concurred.

Appeal dismissed.

Solicitors: *Arifin & Leow; Chooi & Co.*

CHONG KOK HWA v. TAISHO MARINE & FIRE INSURANCE CO. LTD.

[A.C.J. (Ajaib Singh J.) May 6, 1975]
[Seremban — Civil Appeal No. 1 of 1975]

Insurance — Right of insurers to recover from insured after having paid to 3rd party — Road Traffic Ordinance, 1958, s. 80(1).

Practice & Procedure — Specific plea — Waiver.

The respondents in their statement of claim averred that the appellant insured his vehicle for one year from July 11, 1968 to July 10, 1969. On November 13, 1968 the vehicle was involved in a motor accident while it was being driven by the servant or agent of the appellant resulting in damage and injury to the third party. They further averred that one of the conditions in the policy of insurance was that the appellant should as soon as possible give notice of any accident involving the insured vehicle to the respondents but the appellant failed to do so, and he did not give notice of the accident until November 11, 1970. The injured third party sued the appellant and the driver. The respondents defended the suit and paid the sum of \$3,000 as damages for personal injury and \$250 costs to the third party on a judgment by consent entered in the High Court against the appellant and his driver on October 4, 1971. The respondents averred that they were entitled to recover the sum of \$3,250 on the ground that they had repudiated liability on the policy for breach of the aforesaid condition.

Held: in this case the policy is in the usual form as a commercial vehicle indemnity policy and nowhere did it state that the respondents should obtain the prior approval or consent of the appellant before settling a claim by an injured third party.

On the question of plea of waiver appearing in pleadings expressly or impliedly.

Held: (1) in order to raise the plea of waiver the appellant ought to have specifically pleaded it in the defence;

(2) it may be generally accepted that a particular defence which is required to be specifically pleaded but is not done so with sufficient definiteness may be otherwise discernible from the tenor and language used and thus entitled to be considered as a plea in defence. However it must not all be left to the imagination. There must be some outward appear-

ance of at least a semblance of such a plea. In the present case the appellant filed a fairly comprehensive defence in the lower court but there was no indication anywhere in it that the plea of waiver was being relied on by way of defence.

Cases referred to:-

- (1) *Brook v. Trafalgar Insurance Co. Ltd.* (1947) 79 L.L.R. 365.
- (2) *In re Robinson's Settlement, Gant v. Hobbs* [1912] 1 Ch. 717.
- (3) *Thangaulu v. Saudagar Singh* [1965] 1 M.L.J. 38.
- (4) *Yeap Yok Tee v. Lee Boon Bee* [1973] 1 M.L.J. 3.

CIVIL APPEAL.

A.K.J. D'Cruz for the appellant.

N.A. Marjoribanks for the respondents.

Ajaib Singh J.: This is an appeal from the decision of the learned President of the Sessions Court who had given judgment in favour of the respondents against the appellant in the sum of \$3,250 and costs.

The respondents are an insurance company having their registered office in Kuala Lumpur. In their statement of claim the respondents averred that the appellant insured his motor lorry with them for a period of one year from July 11, 1968 to July 10, 1969. On November 13, 1968 the lorry was involved in a motor accident while it was being driven by the servant or agent of the appellant resulting in damage and injury to a third party. The respondents averred further that one of the conditions in the policy of insurance was that the appellant should as soon as possible give notice of any accident involving the insured lorry to the respondents but that the appellant failed to comply with this condition and he did not give notice of the accident until November 11, 1970 almost two years after the accident. In due course the injured third party sued the appellant and the lorry driver who was an authorised driver within the terms of the policy. The respondents defended the suit and paid the sum of \$3,000 as damages for personal injury and \$250 costs to the third party on a judgment by consent entered in the High Court against the appellant and his driver on October 4, 1971. The respondents averred that they were entitled to recover the sum of \$3,250 from the appellant on the ground that they had repudiated liability on the policy for breach of the aforesaid condition.

In his defence the appellant admitted the condition referred to in the statement of claim but denied that he did not give notice of the accident to the respondents. He stated that on or about the day of the accident he informed Chin Kook Chen who at all material times was the agent of the respondents in Seremban and that the said agent undertook to inform the respondents. The appellant contended that he was thus made to believe that he had complied with the said condition, that the respondents were bound by the acts or omissions of their agent and that they were precluded from contending that the appellant had failed to notify the respondents as soon as possible after the accident. Further that the respondents never obtained the appellant's authority to engage solicitors to conduct the defence of the action in which the appellant was named as a defendant. The appellant denied that the respondents were under

any duty to pay the sum of \$3,250 to the injured third party and that if that sum was paid as alleged it was paid by the respondents voluntarily and not under any compulsion.

In the lower court the respondents called their insurance executive Ng Kwoi Heng as their only witness. This witness said that the respondents appointed Chin Kook Chen as a commission agent but he had no authority to receive any claim on their behalf. He was only to canvass business and collect premia. On October 8, 1970 the respondents received information of the accident involving the insured lorry from the solicitors of the injured third party and on the following day the respondents wrote to the appellant drawing his attention to the failure on his part to inform the respondents of the accident and telling him that he had thereby committed a breach of the terms of the policy thus giving the respondents the right to repudiate liability. He was also told that the respondents would hold him responsible for any loss that they might suffer arising out of any claim by the injured third party. Together with this letter the respondents enclosed their printed notice of accident form and requested that it be completed and returned to them for their attention without prejudice to their right of repudiation of liability. The respondents received no reply and they had to instruct their solicitors who on October 28, 1970 wrote to the appellant to act on their clients' letter of October 9, 1970. The appellant then sent in the notice of accident form duly completed and signed by him and dated as November 25, 1968. This form was received by the respondents on November 11, 1970. Ng Kwoi Heng said that after receiving the form he passed it on to his solicitors and was advised to settle the claim on a 50-50 basis which came to \$3,000 as damages and \$250 costs. These sums were eventually paid by the respondents to the injured third party. In cross-examination Ng Kwoi Heng said that the terms of appointment of the respondents' agents were put in writing. However he said that he did not have the document concerning the terms of appointment of the agent Chin Kook Chen and he was not able to produce it. He said that the respondents had only one or two chief agents throughout the country who had the authority to act on their behalf and who received allowances. Commission agents had no such authority nor did they get any allowance. They only earned commission from the respondents. Ng Kwoi Heng said that the first information the respondents received about the accident was from the solicitors of the injured third party on October 8, 1970 whereupon the respondents wrote to the appellant on the following day. According to his records no notice of the accident was received by the respondents in 1968. He disagreed that the respondents had paid voluntarily to the injured third party.

The appellant gave evidence himself and called the agent Chin Kook Chen in support of his defence. The appellant said that his lorry was involved in an accident in November 1968 and he reported the accident to the police. A few days later he informed Chin Kook Chen who told him that he would notify the head office. He did not hear anything about the

matter after that and knew nothing about the claim for damages against him and his driver from the time of the institution of the claim until settlement. The appellant's witness Chin Kook Chen gave his occupation as commission agent and said that he was a subagent of Federal Trade who were the chief agents of the respondents. He had sold the policy in respect of the appellant's lorry in 1968. In November 1968 the appellant informed him of an accident involving the lorry. He handed the appellant a claim form, helped him to fill it up and sent the form by post to the respondents in Kuala Lumpur. Chin Kook Chen produced a carbon copy of a form dated November 25, 1968 and said that it was the copy of the form which he had typed and sent to the respondents in November 1968. In 1970 the appellant approached him saying that the insurance company had not received the form which was sent in 1968. One or two days later he obtained another form and sent it to the respondents. In cross-examination Chin Kook Chen said that he had typed the form which he sent in 1970 as he had done previously in 1968 and he said that the carbon copy which he produced in court was the copy of the first form which he sent in 1968. He ceased to be a commission agent of the respondents in 1969.

On the evidence before him the learned President gave judgment in favour of the respondents and ordered the appellant to pay the sum of \$3,250 and costs. In his grounds of judgment the learned President said that on the evidence as a whole and on a balance of probabilities he came to the conclusion that the appellant had not in fact sent any notice of the accident to the respondents in November 1968. He also held that Chin Kook Chen was an ordinary agent and that he had no authority to receive any claim on behalf of the respondents and he further held that the appellant was in breach of the condition in the policy which required him to give notice of any accident involving the insured lorry as soon as possible after its occurrence.

Mr. A.K.J. D'Cruz for the appellant submitted that the learned President erred in deciding in favour of the respondents. He said that soon after the accident in November 1968 the appellant informed the respondents' agent and that should have been taken as sufficient notice for the purpose of the terms of the policy. Secondly, Mr. D'Cruz said that by taking over the conduct of the defence and settling the claim without any reference to the appellant the respondents had waived their right to repudiate liability upon the breach of the condition that the appellant should notify the respondents of any accident involving the lorry as soon as possible after the accident and the respondents therefore could not rely upon the said breach. He also said that the respondents had not in fact repudiated liability but had only threatened to do so. Mr. D'Cruz also referred to the evidence of the insurance executive Ng Kwoi Heng and said that because the document relating to the terms of appointment of the agent Chin Kook Chen was not produced an adverse inference should be drawn against the respondents by virtue of the provisions of section 114 of the Evidence Act, 1950.

Mr. Marjoribanks for the respondents submitted that Chin Kook Chen was a mere commission agent without any authority to accept claims on behalf of the respondents and merely informing him of the accident was not a sufficient compliance with the relevant condition in the insurance policy. He also submitted that the conduct of the respondents clearly showed that there had been a valid repudiation of liability. On the question of waiver he referred to the case of *Brook v. Trafalgar Insurance Company, Ltd.*⁽¹⁾ and said that the issue of waiver was not pleaded by the appellant and he was therefore precluded from raising it either in the trial court or in the High Court on appeal.

With respect I can find no merit in this appeal. In the first place it was a question of fact for the learned President to decide whether or not on the evidence before him the appellant had notified the respondents that an accident had occurred involving the lorry as soon as possible after its occurrence on November 13, 1968. The learned President came to the conclusion that the appellant did not notify the respondent in 1968 but had done so only in November 1970. On the evidence before him the learned President was quite right in arriving at that conclusion and I can see no reason for interfering with this finding of fact. Moreover looking closely at the carbon copy of the purported 1968 form and comparing it with the form received by the respondents on November 11, 1970 it can be seen that the copy is in fact an exact carbon copy of the notice which was sent in November 1970. The words typed out in the 1970 form and those in the purported carbon copy of the 1968 form are exactly the same and in the same position — even the errors and the superimposed type-written words correcting errors and omissions are exactly the same in the so called 1968 copy and in the 1970 form. Chin Kook Chen was obviously not telling the truth when he said that the carbon copy which he produced was the 1968 copy. It may be observed here that the appellant himself did not in his evidence say that he had filled and signed any claim form in November 1968. All he said was that he informed the agent who in turn said that he would notify the head office. On the question of the repudiation of liability the letters sent by the respondents and their subsequent conduct clearly indicate that they had repudiated liability on the policy. In their very first letter dated October 9, 1970 addressed to the appellant the respondents had made it clear that they would hold the appellant responsible for any third party claim which might be made against them arising out of the accident involving the insured lorry and they had requested the appellant to complete the notice of accident form without prejudice to their right of repudiation of liability.

With regard to the submission that the respondents did not obtain the appellant's authority to engage solicitors to conduct the defence of the action instituted by the injured third party and that the respondents settled the third party's claim voluntarily without the prior approval or consent of the appellant I need only refer to another condition in the policy which states that the respondents should be entitled if they so desire to take over and conduct in the appellant's

A name the defence or settlement of any claim and should have full discretion in the conduct of any proceedings and in the settlement of any claim. In my view this condition is wide enough to allow the respondents to take over the proceedings and to engage solicitors of their own choice at any stage in any action which might be instituted against the appellant arising out of an accident involving the insured lorry without any reference to the appellant and to settle the action as they deem fit. The respondents were in no way bound to obtain the prior approval or consent of the appellant before settling the claim of the injured third party. The policy is in the usual form as a commercial vehicle indemnity policy and nowhere does it state that the respondents should obtain the prior approval or consent of the appellant before settling a claim by an injured third party.

I shall now deal with the question of waiver. In order to raise the plea of waiver the appellant ought to have specifically pleaded it in the defence. This was not done and the appellant therefore had no right to rely on this particular defence either in the lower court or on appeal. If in an action instituted in the subordinate courts a defendant intends to rely on new facts by way of defence he must do so by setting out those facts in his defence by virtue of rule 4(b) of Order X of the Subordinate Courts Rules which says that a defence shall state concisely any new facts on which the defendant relies by way of defence. The plea of waiver comes within this rule. It is a special ground of defence and it must be specifically pleaded before a defendant can adduce any evidence in support and rely on it. Rule 4(b) of Order X of the Subordinate Courts Rules is akin to rule 15 of Order 19 of the Rules of the Supreme Court and one common principle behind these rules is that a defendant who seeks to rely on a defence which may justify or excuse any act complained of against him must make his stand clear in the defence. In the case of *In re Robinson's Settlement, Gant v. Hobbs*⁽²⁾ Buckley L.J. referring to Order 19 rule 15 said that —

"The effect of the rule is, I think, for reasons of practice and justice and convenience to require the party to tell his opponent what he is coming to the court to prove. If he does not do that the court will deal with it in one of two ways. It may say that it is not open to him, that he has not raised it and will not be allowed to rely on it; or it may give him leave to amend by raising it, and protect the other party if necessary by letting the case stand over. The rule is not one that excludes from the consideration of the court the relevant subject-matter for decision simply on the ground that it is not pleaded. It leaves the party in mercy and the court will deal with him as is just."

Mr. D'Cruz submitted that despite the absence of the plea of waiver the court should consider it if the pleadings otherwise show its existence. In support of this submission he referred to the case of *Thangaulu v. Saudagar Singh*⁽³⁾ and the case of *Yeap Yok Tee v. Lee Boon Bee*.⁽⁴⁾ Mr. D'Cruz said that although waiver was not specifically mentioned the appellant's defence filed in the lower court showed that waiver was in issue and on the two authorities cited the court should consider this issue. I shall have to say more on this submission later but let me say this much here that I do not agree with Mr. D'Cruz that the appellant's defence showed that waiver was in issue. Nowhere in the defence or in the evi-

dence adduced at the trial is there any suggestion that the appellant relied on the plea of waiver. Rather it was being stressed all along that the appellant had complied with the relevant condition in the policy when he notified the respondents' agent of the accident involving the insured lorry. So I fail to see how the two authorities just cited can assist the appellant's case. In *Thangaulu's* case the appellant in his defence pleaded illegality of contract by reason of the non-compliance with the provisions of a section in the Moneylenders Ordinance but he did not raise this point at the trial. On appeal Gill J. (as he then was) held that although the appellant did not raise the defence of illegality at the trial he was nevertheless entitled to raise it on appeal. The point to note here is that illegality was in fact pleaded in the defence. It was there on the record and therefore available to the appellant on appeal. Illegality of contract moreover is on a different footing from that of waiver and although not specifically pleaded the illegality must be considered by the court if the contract is on the face of it illegal or its illegality is otherwise brought out in evidence at the trial. In the other case cited by Mr. D'Cruz the pleadings in the lower court showed the existence of certain issues and on appeal Ibrahim J. held in effect that those issues could be raised on appeal.

It may be generally accepted that a particular defence which is required to be specifically pleaded but is not done so with sufficient definiteness may be otherwise discernible from the tenor and language used and thus entitled to be considered as a plea in defence. However it must not all be left to the imagination. There must be some outward appearance of at least a semblance of such a plea. In the present case the appellant filed a fairly comprehensive defence in the lower court but I can find no indication anywhere in it that the plea of waiver was being relied on by way of defence. The respondents alleged in their statement of claim that the appellant failed to comply with the condition in the policy which states that the appellant should notify the respondents as soon as possible after any accident involving the insured lorry. In his defence the appellant admitted the existence of this condition in the policy but denied that he did not give notice of the accident for the reason that he had notified the agent. There is no mention nor any suggestion anywhere of waiver as a plea by way of defence.

Even if the appellant had pleaded waiver it would not have helped his case. There was no evidence to support this plea. When they took over the conduct of the proceedings in the action instituted by the injured third party against the appellant and settled the action without contest the respondents were merely exercising their rights under the policy. In no sense could it be said that the respondents had thereby waived any express condition in the policy especially when they had warned the appellant that he would be held responsible for any third party claim which might be made against them arising out of the accident involving his lorry. The appellant was required to give notice of the accident to the respondents as soon as possible after its occurrence under one of the conditions in the policy. Another condition provided

A that every notice or communication to be given or made under the policy should be delivered in writing to the respondents. The appellant and the respondents were bound by the terms and conditions in the policy and insofar as their rights and obligations under the policy were concerned any evidence inconsistent with those terms and conditions would be irrelevant and inadmissible unless the parties themselves had expressly agreed to any variation of the terms and conditions. The non-production of the document setting out the terms of employment of the agent Chin Kook Chen therefore could have had no adverse effect on the respondents' case. In the schedule to the policy Chin Kook Chen's name is entered in the "Agency" column but this cannot clothe him with any authority to accept a notice or communication on behalf of the respondents nor can it mean that the delivery of a written notice or communication to Chin Kook Chen would be a sufficient compliance with the condition that every notice or communication to be given or made under the policy should be delivered in writing to the respondents. By describing Chin Kook Chen in the policy as their agent the respondents were in one way empowering him to waive the condition in the policy which obliged the appellant to deliver a written notice of the accident to the respondents as soon as possible after its occurrence. With regard to the position of agents working for insurance companies Scott L.J. in the case of *Brook v. Trafalgar Insurance Company, Ltd.*, *supra*, said as follows:—

"... It is common knowledge to everybody that policies are issued at the instance of agents who procure the business and who get a small commission on the premium for doing so. That is the sense which *prima facie* the printed word "Agent" at the bottom of a policy bears; it appears there for the simple reason that it so serves as a record for the office files of the company as to who was the person entitled to commission. To suggest that the word "Agent" in front of the name there gives the commission agent authority to take the place of the company and waive an express condition requiring that written notice should be sent to the head office of the company, when they have dozens of agents all over the country of that type, is, I venture to think, ridiculous."

In the same case Scott L.J. had this to say on the plea of waiver—

G "To put forward a plea of waiver, whether before breach or after breach, of a condition precedent to the right of action contained in a policy is a very serious step. It is quite obvious that it is essential in the interests of justice that the insurance company in such circumstances should have their attention called beforehand to the fact that it is intended to rely on an issue of the kind upon which evidence can be called, and in the absence of an application for leave at the trial to introduce a new issue in that way, I respectfully think that the learned judge was wrong in considering the issue at all."

The obligation on the part of the appellant to give notice of the accident and to deliver the notice in writing to the respondents had to be satisfied before the respondents could become liable under the policy for it is expressly stated in the policy that the due observance and fulfilment of the terms of the policy insofar as they relate to anything to be done by the appellant shall be conditions precedent to any liability of the respondents to make any payment under the policy. At the same time it is provided that nothing in the policy should affect the right of a person to recover an amount under or by virtue of the Road Traffic Ordinance 1958 but that the appellant should

repay to the respondents all sums paid by them which they would not have been liable to pay but for the Road Traffic Ordinance. The judgment obtained by the injured third party against the appellant was in respect of a liability covered by the terms of the policy within the meaning of section 80(1) of the Road Traffic Ordinance, 1958 and by virtue of that section it became the duty of the respondents to satisfy that judgment notwithstanding that they were entitled to avoid the policy by reason of the failure on the part of the appellant to observe and fulfil the conditions precedent to their liability. In instituting their action against the appellant the respondents were doing no more than pursuing their legitimate right to be reimbursed with the amount which they would not have been liable to pay to the injured third party but for section 80(1) of the Road Traffic Ordinance, 1958.

The appeal is dismissed with costs.

Appeal dismissed.

Solicitors: *A.K.J. D'Cruz & Co.; Lovelace & Hastings.*

HANAFIAH, RASLAN, MOHAMED & PARTNERS v. WENG LOK MINING CO. LTD.

[O.C.J. (Chang Min Tat J.) March 31, 1976]

[Kuala Lumpur — Civil Suit No. 1568 of 1970]

Contract — Accountants employed to prepare and audit accounts and to submit tax returns — Accountants subsequently successful in reducing tax liability of company — Alleged agreement to pay fee of \$10,000 for work — Plea that there was no consideration for the further fee.

Accountants — Preparing and auditing accounts — Reduction of tax liability — Whether extraordinary skill.

In this case the plaintiffs claimed the sum of \$10,000 which they alleged was due to them for the work they had done for the defendants in successfully reducing their tax liability for the years 1964-1967 inclusive. The defendants contended that the work undertaken by the plaintiffs in reducing the tax liability was part of the work which was undertaken for them by the plaintiffs as their accountants and that this work had been paid for by them by separate fees for preparing accounts, auditing them, making up their returns and submitting proposed tax computations. The defendants further contended that the original assessment of revenue was the result of errors made in the tax computations. They therefore maintained that there was no consideration for the further fee agreed and they refused to pay. They counter-claimed for damages because of the mistake made by the plaintiffs, as a result of which they had been assessed for a large amount of tax.

Held: (1) in this case the plaintiffs had not shown that extraordinary skill was required of them to get the tax reductions and therefore the claim must be dismissed;

(2) it was reasonable to hold that but for the mistake of the plaintiffs the demand for the tax would not have been made or if it was made it would have been for the much smaller adjusted figure. The legal fees, costs and penalty paid by the defendants flowed reasonably from the negligence of the plaintiffs and they were therefore liable to pay damages therefor.

Cases referred to:-

- (1) *Stilk v. Myrick* 170 E.R. 1168.
- (2) *Ramachandra Chintaman v. Kabu Raja & Anor.* I.L.R. 1878 Bom. 362.
- (3) *Hartley v. Ponsonby* 119 E.R. 1471.
- (4) *Greaves & Co. (Contractors) Ltd. v. Beyuham, Meikle and Partners* [1975] 1 W.L.R. 1095.

A CIVIL SUIT.

R. Sadacharam for the plaintiffs.

K. Thayalan for the defendants.

Chang Min Tat J.: The claim of the plaintiffs, a firm of accountants and tax consultants against the defendant firm was for a fee of \$10,000 which they said was due to them for the work that they had done for the defendants in successfully reducing their tax liability for the years of assessment 1964 to 1967 inclusive. The defendants had been assessed to tax in the sums of \$8,658, \$29,947.20 and \$40,652.40 and \$49,500 for the years of assessment 1964 to 1967 respectively. As a result of the representations made by Mr. Timothy Phua a partner of the plaintiff firm, representations which were summarised in a letter dated August 6, 1969 Revenue reduced the assessment for 1964 to nil, for 1965 to \$6,578.40, for 1966 to nil, as also for the year of assessment 1967. There was therefore a saving for the defendants of \$122,179.20. It was contended by the plaintiff firm that this fee was agreed to between the managing-director of the defendant-firm and Mr. Phua. The original fee was confirmed by a letter dated August 3, 1969 for \$5,000 but subsequently another partner struck a bargain with the defendants to raise the fee to \$10,000 on a contingency basis, if the tax should be successfully reduced to below \$20,000. This bargain was also confirmed in writing by the defendants.

One would have expected that the defendants would have been grateful for this enormous reduction in their tax liability and would have gladly paid the fee of \$10,000. But that unfortunately was not so. The case of the plaintiffs was not the whole story. The defendants came to the idea that the work undertaken by the plaintiff firm in reducing the tax liability was part of the work which they said was undertaken for them by the plaintiffs as their accountants and that this work had been paid for by separate fees for preparing accounts, auditing them, making up their returns and submitting proposed tax computations. The defendants considered that the original assessment of revenue were the result of errors made in the tax computations. They maintained therefore that there was no consideration for the further fee agreed. On this score, they refused to pay.

Various errors were alleged. It will be sufficient to deal with three of them. The first concerned the sum paid for mining rights. The defendants claimed that their books showed the sum of \$188,859 whereas the plaintiffs were said to be in error in admitting to only a sum of \$104,800. The sum of \$188,859 was indeed claimed in the tax returns but was disallowed. A distinction should, I think, be drawn between making a claim and not pursuing it further when it was disallowed. I am however satisfied with the evidence that the sum entered in the defendants' books included a sum of \$84,059 which were in actual fact losses incurred by another entity, namely the partners, who are presumably the antecedents of the defendant-firm. These losses were at law not claimable and it would be an exercise in fatuity to proceed to do so. It was not pursued by Mr. T. Phua in his intervention. That fact itself must speak against it. I am therefore satisfied that in not pressing for the bigger sum, the plaintiff firm was not in error.